

# ETHICS UPDATE

## Show of the South

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### TDEC/TBA

MAY 16, 2018

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*PRESENTED BY LAURA CHASTAIN*

*ETHICS COUNSEL*

*BOARD OF PROFESSIONAL RESPONSIBILITY*



# MAINTENANCE OF CLIENT DATA

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**Keep Confidential Client  
Information -**



# DATA STORAGE - CLIENT FILES

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BECAUSE CLOUD COMPUTING PLACES DATA, INCLUDING CLIENT DATA, ON REMOTE SERVERS OUTSIDE OF THE LAWYER'S DIRECT CONTROL, IT GIVES RISE TO SOME CONCERNS REGARDING ITS ACCEPTABILITY UNDER APPLICABLE ETHICS RULES.

“CLOUD ETHICS OPINIONS AROUND THE U.S.” AMERICAN BAR ASSOCIATION LEGAL TECHNOLOGY RESOURCE CENTER FINDS THE STANDARD OF ‘**REASONABLE CARE**’ WITH REGARD TO THE LAWYERS’ USE OF CLOUD TECHNOLOGY FROM ALL STATES SUPPORTING THE USE OF CLOUD STORAGE.

# FORMAL ETHICS OPINION 2015-F-159 ADDRESSES MAINTAINING CLIENT DATA IN “THE CLOUD”.

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BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2015-F-159**

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May an attorney ethically store confidential client information or material in “the cloud”?

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**OPINION**

A lawyer may ethically allow confidential client information to be stored in “the cloud” if the lawyer takes reasonable care to assure that: (1) all such information or materials remain confidential; and (2) reasonable safeguards are employed to ensure that the information is protected from breaches, loss, and other risks. Due to rapidly changing technology, the Board doesn’t attempt to establish a standard of care, but instead offers guidance from other jurisdictions.

# TN FORMAL ETHICS OPINION 2015-F-159

PERMITS DATA STORAGE IN “THE CLOUD” SO LONG AS THE LAWYER’S DUTIES TO CLIENTS ARE FULFILLED. THE OPINION GIVES GUIDANCE ON HOW TO CHOOSE A DATA STORAGE PROVIDER AND SETS OUT THE LAWYER’S OBLIGATIONS WITH RESPECT TO MAINTAINING CONFIDENTIALITY.

OF PARTICULAR INTEREST TO IN HOUSE ATTORNEYS IS THE RECOGNITION THAT “OFTEN IN-HOUSE COUNSEL HAS NO INPUT WITH REGARD TO THE TECHNOLOGY USED BY THE CORPORATION, BUT OWES THE DUTY OF COMMUNICATION WITH THE CORPORATE CLIENT REGARDING THE RISKS AND BENEFITS OF CLOUD STORAGE. COMMENT 3 TO RPC 1.13 STATES THAT WHEN CONSTITUENTS OF THE ORGANIZATION MAKE DECISIONS FOR IT, THE DECISIONS ORDINARILY MUST BE ACCEPTED BY THE LAWYER EVEN IF THEIR UTILITY OR PRUDENCE IS DOUBTFUL. DECISIONS CONCERNING POLICY AND OPERATIONS, INCLUDING ONES ENTAILING SERIOUS RISK, ARE NOT AS SUCH IN THE LAWYER’S PROVINCE. *ISSUED 9-11-15*

# CONFIDENTIALITY IS THE PRIMARY CONCERN IN MAINTAINING CLIENT DATA





# WHAT ABOUT USING “DROPBOX” OR SIMILAR WEBSITES FOR TRANSMITTING CLIENT DATA ?

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# THE LAWYER IS **NOT** REQUIRED BY THE RULES TO USE INFALLIBLE METHODS OF PROTECTION 2015-F-159

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WHEN TRANSMITTING A COMMUNICATION THAT INCLUDES INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT, THE LAWYER MUST TAKE REASONABLE PRECAUTIONS TO PREVENT THE INFORMATION FROM COMING INTO THE HANDS OF UNINTENDED RECIPIENTS.

THIS DUTY DOES NOT REQUIRE THE LAWYER TO USE SPECIAL SECURITY MEASURES IF THE METHOD OF COMMUNICATION AFFORDS A REASONABLE EXPECTATION OF PRIVACY.

# *HARLEYSVILLE INS. CO. V. HOLDING FUNERAL HOME, INC.* 2017 WL 1041600 (W.D. Va. Feb 9, 2017)

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A PARTY UPLOADED PRIVILEGED DOCUMENTS INTO A CLOUD FILE-SHARING ACCOUNT UNPROTECTED BY A PASSWORD. OPPOSING COUNSEL FOUND THE HYPERLINK THROUGH DISCOVERY HAPPENSTANCE, ACCESSED THE ACCOUNT, DOWNLOADED AND READ THE DOCUMENTS. THE COURT HELD THAT THE PARTY WAIVED BOTH ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IMMUNITY AS TO THE DOCUMENTS.

JUDGE GAVE A METAPHOR THAT HARLEYSVILLE HAD EFFECTIVELY LEFT THE FILE ON A PUBLIC BENCH AND GIVEN AWAY THE DIRECTIONS

**ON APPEAL** THE DISTRICT JUDGE SUSTAINED KEY OBJECTION TO THE MAGISTRATE JUDGE'S OPINION THAT HELD THAT HARLEYSVILLE INSURANCE COMPANY WAIVED THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.

FOUND THAT HARLEYSVILLE HAD TAKEN REASONABLE PROTECTIVE MEASURES TO PRESERVE THE FILE'S CONFIDENTIALITY WHEN IT LOADED THE FILE ON A BOX CLOUD ACCOUNT ACCESSIBLE ONLY VIA A LENGTHY RANDOMLY GENERATED HYPERLINK.

THE AGENT INEXPERIENCED WITH BOX'S FILE SHARING SERVICE ASSUMED THAT THE HYPERLINK EXPIRED WITHIN A FEW DAYS.

ALL PRIVILEGED AND CONFIDENTIAL MATERIAL WAS MARKED AS SUCH.

THE JUDGE CONCLUDED THAT HARLEYSVILLE  
TOOK “REASONABLE PRECAUTIONS” TO  
PREVENT INADVERTENT DISCLOSURE AND  
THAT THIS WEIGHED AGAINST WAIVER.

WORK PRODUCT PRIVILEGE REQUIRES “INADVERTENT DISCLOSURE”  
AND THE JUDGE FOUND DISCLOSURE WAS INADVERTENT AND THAT  
THERE WAS NO WAIVER.

NOW THE OPINION GETS INTERESTING....

THE JUDGE FOUND THAT HOLDING'S  
COUNSEL "HAD AN OBLIGATION TO:

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'PROMPTLY RETURN, SEQUESTER, OR DESTROY' THE  
PRIVILEGED MATERIALS," AND ALSO A DUTY TO  
REVEAL THEIR DISCLOSURE, BUT DID NEITHER AND  
"FELL FAR SHORT OF THEIR [ETHICAL]  
RESPONSIBILITY."

## RPC 4.4(b)

A LAWYER WHO RECEIVES INFORMATION (INCLUDING, BUT NOT LIMITED TO, A DOCUMENT OR ELECTRONICALLY STORED INFORMATION) RELATING TO THE REPRESENTATION OF THE LAWYER'S CLIENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS PROTECTED BY RPC 1.6 (INCLUDING INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE OR THE WORK PRODUCT RULE) AND HAS BEEN DISCLOSED TO THE LAWYER INADVERTENTLY OR BY A PERSON NOT AUTHORIZED TO DISCLOSE SUCH INFORMATION TO THE LAWYER, **SHALL:**

(1) IMMEDIATELY TERMINATE REVIEW OR USE OF THE INFORMATION;

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(2) NOTIFY THE PERSON, OR THE PERSON'S LAWYER IF THE COMMUNICATION WITH THE PERSON IS PROHIBITED BY RPC 4.2, OF THE INADVERTENT OR UNAUTHORIZED DISCLOSURE; AND

(3) ABIDE BY THAT PERSON'S OR LAWYER'S INSTRUCTIONS WITH RESPECT TO DISPOSITION OF WRITTEN INFORMATION OR REFRAIN FROM USING THE WRITTEN INFORMATION UNTIL OBTAINING A DEFINITIVE RULING ON THE PROPER DISPOSITION FROM A COURT WITH APPROPRIATE JURISDICTION.



# HOW LONG DO I HAVE TO MAINTAIN CLIENT DATA?

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# FORMAL ETHICS OPINIONS 2016-F-160 AND 2016-F-160(a)

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BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2015-F-160**

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The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion as guidance for lawyers regarding the lawyer's responsibility with regard to client files.

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**OPINION**

Lawyers have ethical obligations to preserve client files and to return them or permit access to them by the client if requested. There is no Rule of Professional Conduct in Tennessee that requires a lawyer to retain client files for more than five (5) years following termination of representation; however, the type of representation and file contents may require a longer retention time. *See discussion.*

The entire client file, for which the lawyer has been compensated, belongs to the client. If the lawyer wants a copy, the lawyer should bear that expense. If the lawyer has not been compensated, the lawyer may retain work product, but only if retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation.

When a lawyer retires from the practice of law, his or her responsibility for client files does not end with retirement. If the lawyer has been practicing in a law firm, those responsibilities are shared by the firm. A retiring lawyer does not necessarily have to notify former clients of the lawyer's retirement advising such clients of various safekeeping options, provided the lawyer has made arrangements for the safekeeping of files for an appropriate period of time. A lawyer retiring from a firm may satisfy the safekeeping requirement by the firm's keeping the files. Assuming a retiring solo practitioner has not changed his or her residence and can reasonably be contacted by former clients, such retiring solo practitioner may satisfy the safekeeping requirement by simply keeping the files in a location readily accessible to the retiring lawyer and/or client. This further assumes that confidentiality of the files can be maintained. The retiring lawyer may choose to notify the clients, and, if an agreement has not already been reached with regard to the client files, the lawyer may propose some alternatives: placing the files with a named attorney who will assist the retiring lawyer in closing out his or her law practice, or assist the client in transferring the files to an attorney chosen by the client, or return the files to the client.

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2015-F-160(a)**

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The Board of Professional Responsibility issues this amended Formal Ethics Opinion to clarify a lawyer's responsibility with regard to client files.

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**OPINION**

The Board of Professional Responsibility recommends a lawyer retain client files for five (5) years after termination of representation; however, this is merely a guideline and may be altered by client agreement or the type of representation and contents of the file.

# ETHICS

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update

# THE BOARD HAS ISSUED 3 NEW FORMAL ETHICS OPINIONS

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# PROSECUTOR'S DUTY TO DISCLOSE EVIDENCE FAVORABLE TO DEFENSE

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BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

## FORMAL ETHICS OPINION 2017-F-163

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The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense.

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### OPINION

Tennessee Rule of Professional Conduct 3.8(d) is a separate ethical obligation of prosecutors and was not meant to be coextensive with a prosecutor's legal disclosure obligations. This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. A prosecutor's ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*. Once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or mitigates the offense, or otherwise falls within RPC 3.8(d)'s disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable.

DISCUSSION

# ADVERTISING – USE OF TRADE NAME

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BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2017-F-164**

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The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the opening and operation of a proposed interstate law firm, using a trade name, SETCO Law (the “Firm”).

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**OPINION**

Interstate law firm partnerships are permitted if they comply with The Tennessee Rules of Professional Conduct. Such interstate law firm partnerships may use a tradename if it complies with RPC 7.1 and RPC 7.5. Interstate law firm partnerships may lease space from a title company if there is a distinct separation between the law firm and the title company with regard to entry way, signage, letterhead, business cards, etc., and the customers of the law related services are advised that the protections of the client-lawyer relationship do not apply to the provision of the law related services of the title company, preferably in writing.

# ADVERTISING – LEGAL MARKET PLACE

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BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

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## **FORMAL ETHICS OPINION 2018-F-165**

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The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical implications of a website owned and operated by a company on which businesses and individuals may post a description of legal services for which they are seeking representation and lawyers/law firms may subsequently submit quotes for the cost of the legal services.

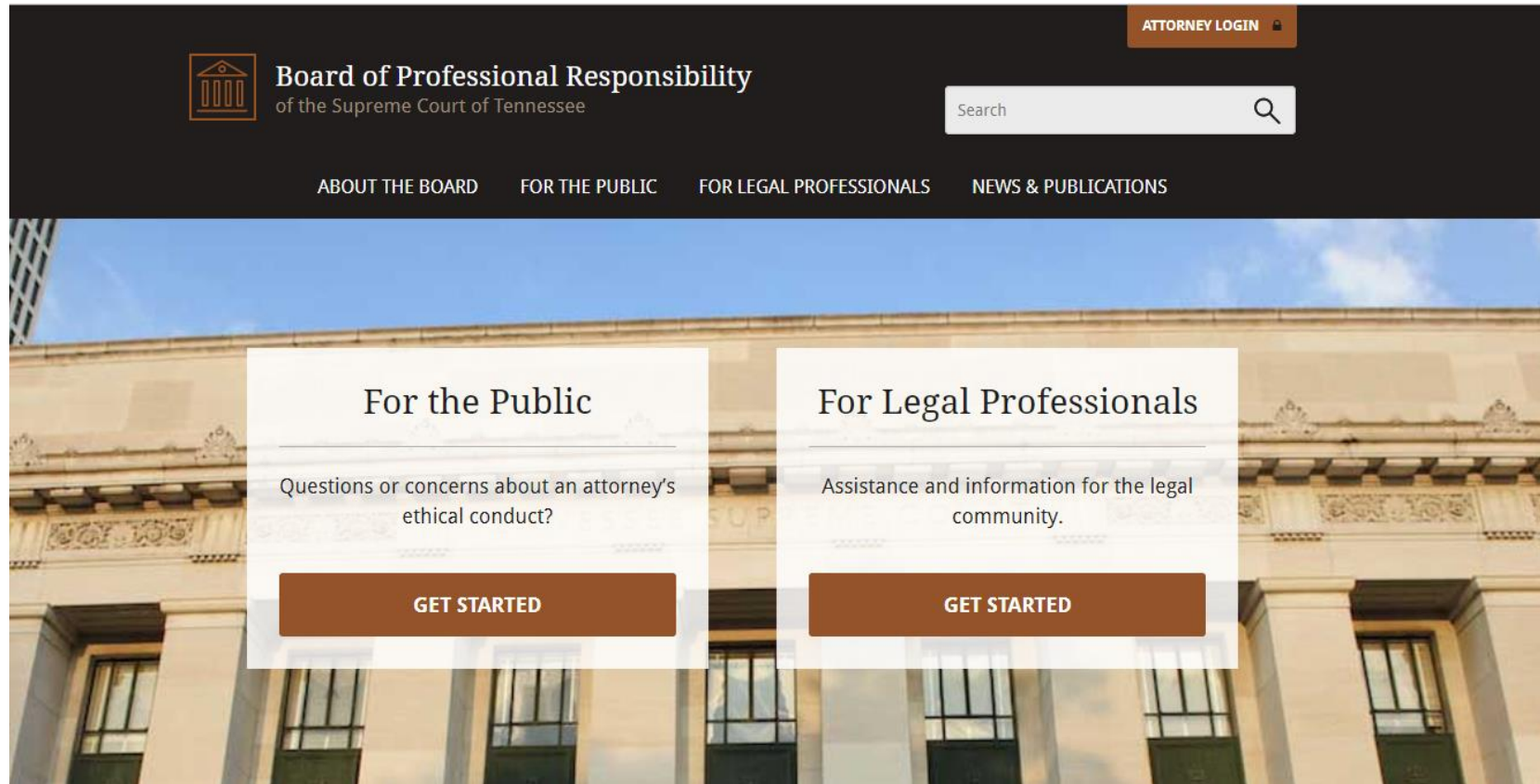
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### **OPINION**

The proposed legal marketplace website, owned and operated by a company on which businesses and individuals may post a description of legal services for which they are seeking representation and lawyers/law firms may subsequently submit quotes for the cost of the legal services, appears to comply with the Tennessee Rules of Professional Conduct if it is operated in accordance with the conditions and guidelines set forth in this opinion.

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# WHERE CAN I FIND THE FORMAL ETHICS OPINIONS ?








## Attorney License Information

- [Information for New Attorneys](#)
- [Active, Inactive & Exempt Status](#)
- [Reinstatement of Law License](#)
- [Letters of Good Standing](#)



## Rules

The Board is governed by the following rules.

- [Board Policies and Rules](#) 
- [Tennessee Supreme Court Rule 8 - Rules of Professional conduct](#)
- [Tennessee Supreme Court Rule 9 - Disciplinary Enforcement](#)
- [Tennessee Supreme Court Rule 43 - Interest on Lawyers' Trust Accounts](#)
- [Tennessee Supreme Court Rule 44 - Regulation of Lawyer Intermediary Organizations](#)



## Ethics Opinions

Search below by keyword, phrase or year for Formal Ethics Opinions issued from 1980 to the present.

Keyword(s) or Opinion Number

- [Formal Ethics Opinions](#)
- [Informal Ethics Inquiries](#)
- [Ethics Frequently Asked Questions](#)




## State Agencies

- [Tennessee Lawyers Assistance Program \(TLAP\)](#)
- [Tennessee Commission on Continuing Legal Education](#)
- [Tennessee Board of Law Examiners](#)
- [Tennessee Bar Foundation](#)



## Trust Accounting

- [Approved Banks and Credit Unions](#) 
- [IOLTA \(Interest On Lawyers Trust Accounts\)](#)
- [Attorney Trust Account Overdraft Notification Agreement](#)





## Pro Hac Vice Attorneys

- [Pro Hac Vice Registration](#)
- [Pro Hac Vice Search](#)
- [Pro Hac Vice Frequently Asked Questions](#)
- [Supreme Court Rule 19 - Appearance Pro Hac Vice in Proceedings Before Tennessee Agencies and Courts by Lawyers Not Licensed to Practice Law in Tennessee](#)



## Resources

- [TLAP \(Tennessee Lawyers Assistance Program\)](#)
- [Frequently Asked Questions regarding Suspended Attorneys](#)
- [Resources for When an Attorney is Unable to Practice Law](#) 
- [File your Professional Privilege Tax](#)
- [The Tennessee Attorney's Trust Account Handbook](#) 
- [Links of Interest](#)



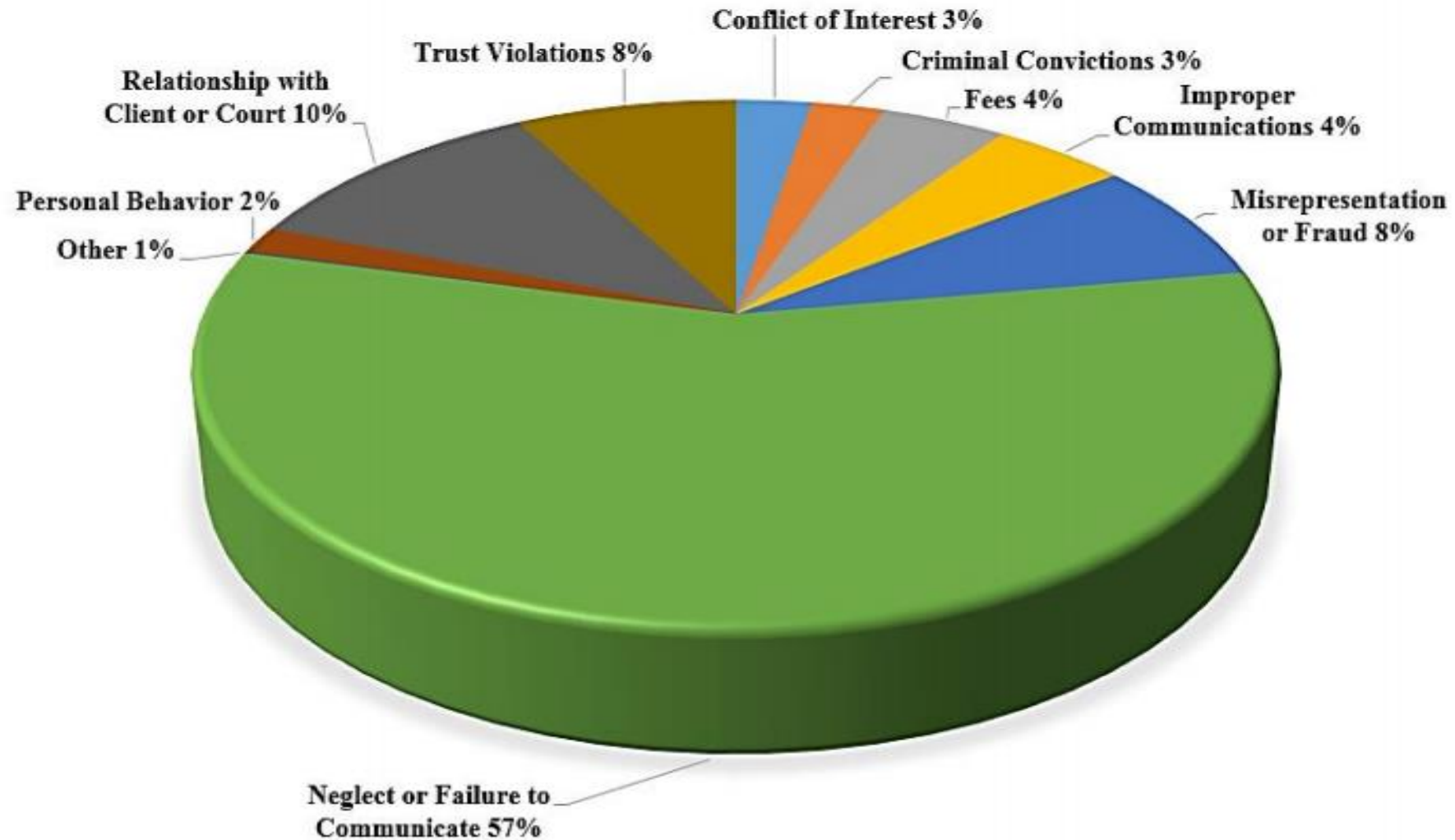
## The Supreme Court Revises Rule 9, § 32.1

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On March 13, 2017, the Board of Professional Responsibility filed a petition asking the Court to amend Rule 9, Section 32 of the Rules of the Tennessee Supreme Court. The petition proposed amending the Rule to clarify that attorney disciplinary hearings are open to the public, unless subject to a protective order. On August 30, 2017, the Court granted the Board's Petition. [Click here](#) to read more about this Rule change.

**36<sup>th</sup> Annual Discipline Report**  
**Fiscal Year July 1, 2016 – June 30, 2017**

**A. Nature of Complaints**



# LAST YEAR 1,385 COMPLAINTS WERE FILED

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1,254 WERE RESOLVED IN THE INVESTIGATIVE PROCESS.

131 WERE RESOLVED IN FORMAL DISCIPLINARY LITIGATION  
PROCEEDINGS.

# LAST YEAR'S DISPOSITION OF INVESTIGATIVE COMPLAINTS

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## **Investigative Complaint Disposition:**

Administrative Dismissals: 510

Investigative Dismissals: 504

Diversions: 30

Private Informal Admonitions: 60

Private Reprimands: 35

Informal Public Censures: 46

Transfer to Disability Inactive: 46

Placed on Retired Status: 13

Other: 10

**Total: 1,254**

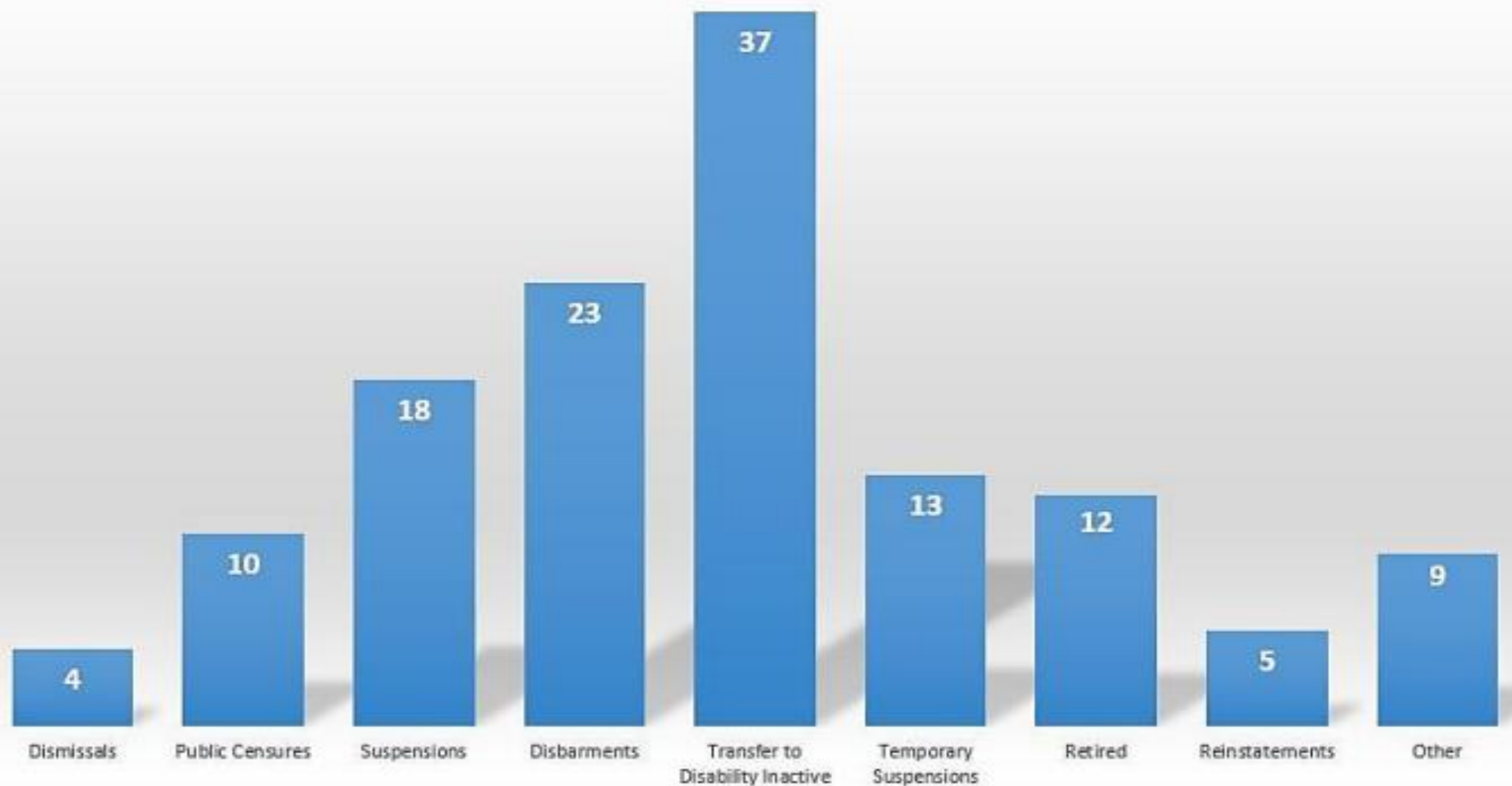
# LAST YEAR'S DISPOSITION OF FORMAL DISCIPLINARY PROCEEDINGS

## **B. Formal Disciplinary Proceedings Disposition:**

Dismissals:	4
Public Censures:	10
Suspensions:	18
Disbarments:	23
Transfer to Disability Inactive:	37
Temporary Suspensions:	13
Retired:	12
Reinstatements:	5
Other <sup>19</sup> :	9
<b>Total:</b>	<b>131</b>

<sup>19</sup> Abated by death, voluntary nonsuited, denied, withdrawn.

## Resolution of Formal Disciplinary Proceedings

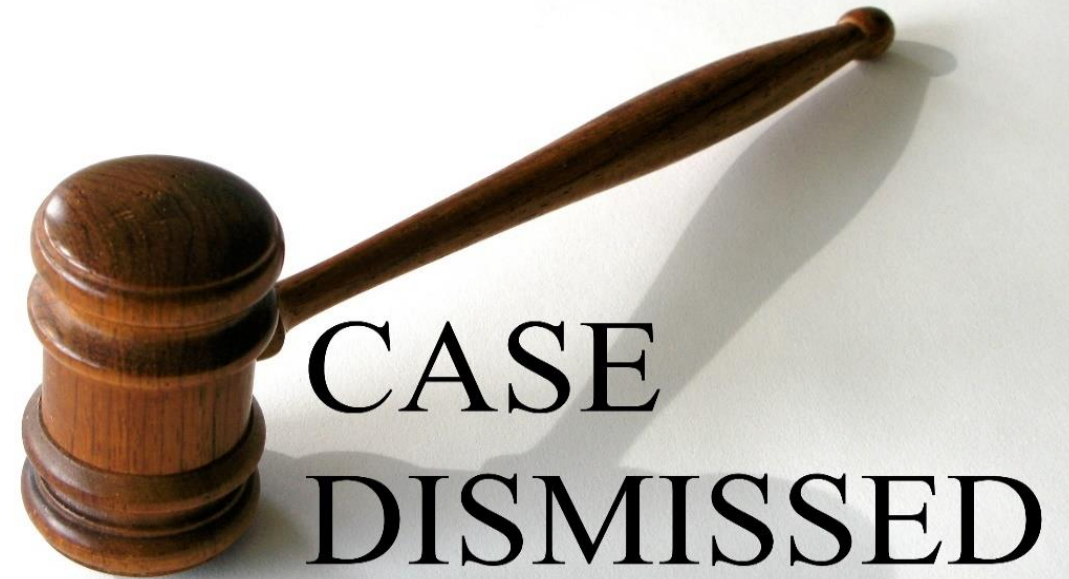




THE GOOD NEWS!

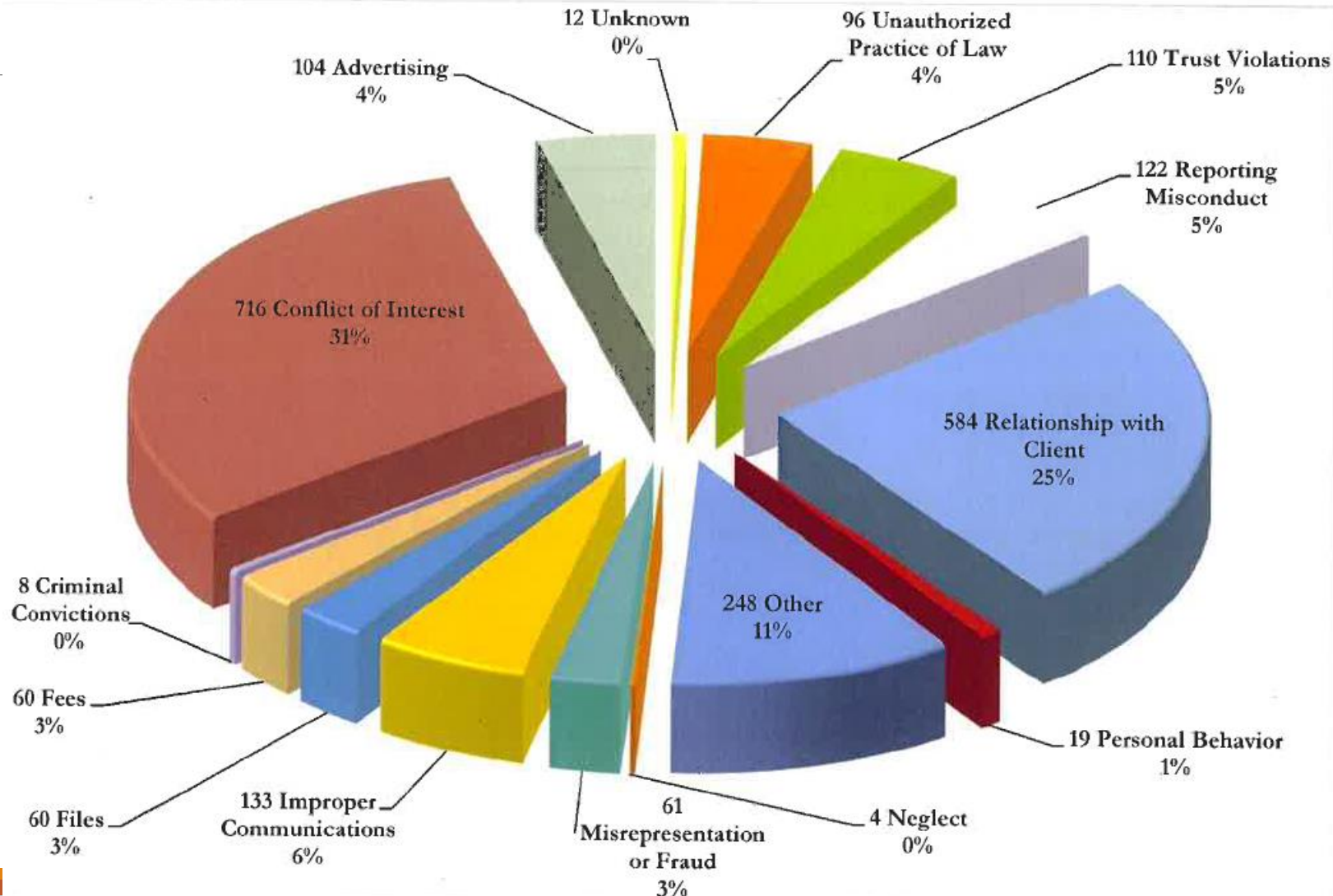
74 % OF COMPLAINTS WERE  
DISMISSED.


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# ETHICS INQUIRIES FROM 1-1-17 THROUGH 12-31-17 (2,337)





# Update on National Task Force on Lawyer Well-Being

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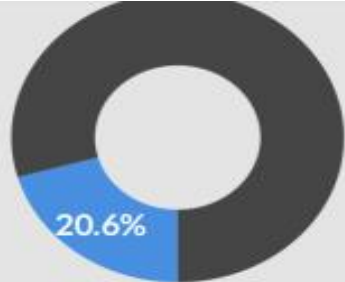
On August 14, 2017, the ABA's Commission on Lawyer Assistance Programs released a comprehensive report, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," aimed at addressing the problem of substance use and mental health disorders of lawyers. ([Click here for full report.](#))

The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL) and was created in response to the 2016 landmark research that gathered national data regarding abuse, mental health issues and help-seeking behaviors of lawyers. ([Click here for research findings.](#)) Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners.

Laura McClendon, Executive Director of the Tennessee Lawyers Assistance Program (TLAP) and current CoLAP Commissioner, was one of the peer reviewers of the report prior to it being released nationally. Ms. McClendon said "Tennessee is on the forefront of responding and addressing the concerns and recommendations in the report. It's exciting to see the collaboration and conversations that have already started!"

The report's recommendations focus on five central themes: (1) identifying stakeholders and the role each one has in reducing the level of toxicity in the profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

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**20.6% of respondents scored at a level consistent with problematic drinking.**

In comparison, 11.8% of a broad, highly educated workforce screened positive on the same measure.



**28% of respondents reported experiencing mild or higher levels of depression.**

46% reported concerns with depression at some point in their career.



**19% of respondents reported experiencing mild or higher levels of anxiety.**

61% reported concerns with anxiety at some point in their career.




**11.5% of respondents reported suicidal thoughts at some point during their career.**

2.9% reported self-injurious behaviors, and 0.7% reported at least 1 prior suicide attempt.







Rates higher  
for younger,  
less  
experienced  
attorneys




Problematic  
drinking =  
higher levels of  
depression,  
anxiety and  
stress



Barrier #1:  
not wanting  
others to find  
out they  
needed help



Barrier #2:  
concerns over  
privacy or  
confidentiality



# WHAT CAN WE DO ?

The report's recommendations focus on five central themes: (1) identifying stakeholders and the role each one has in reducing the level of toxicity in the profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The Tennessee Supreme Court, Administrative Office of the Courts, Board of Professional Responsibility, Board of Law Examiners, CLE Commission, and the Tennessee Lawyers Assistance Program have started round-table discussions with leaders from law firms, bar associations, and law schools to determine the best way to serve, support and help the legal community in Tennessee.

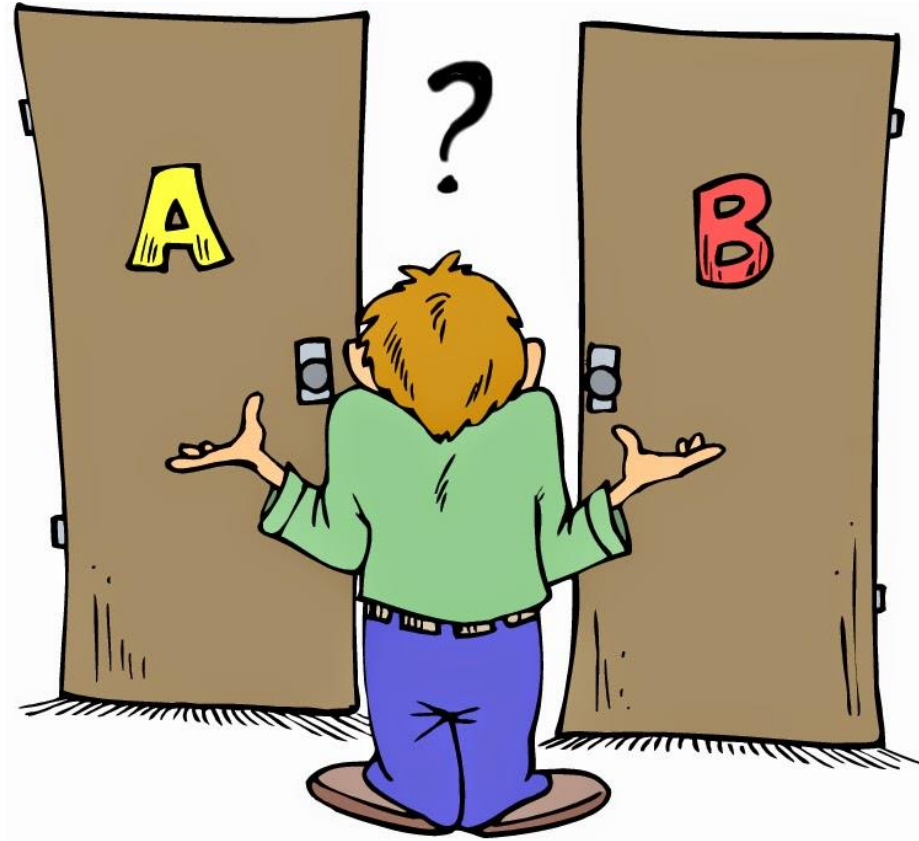
ALL OF THIS INFORMATION CAME FROM  
THE BPR NEWSLETTER, “BOARD NOTES”

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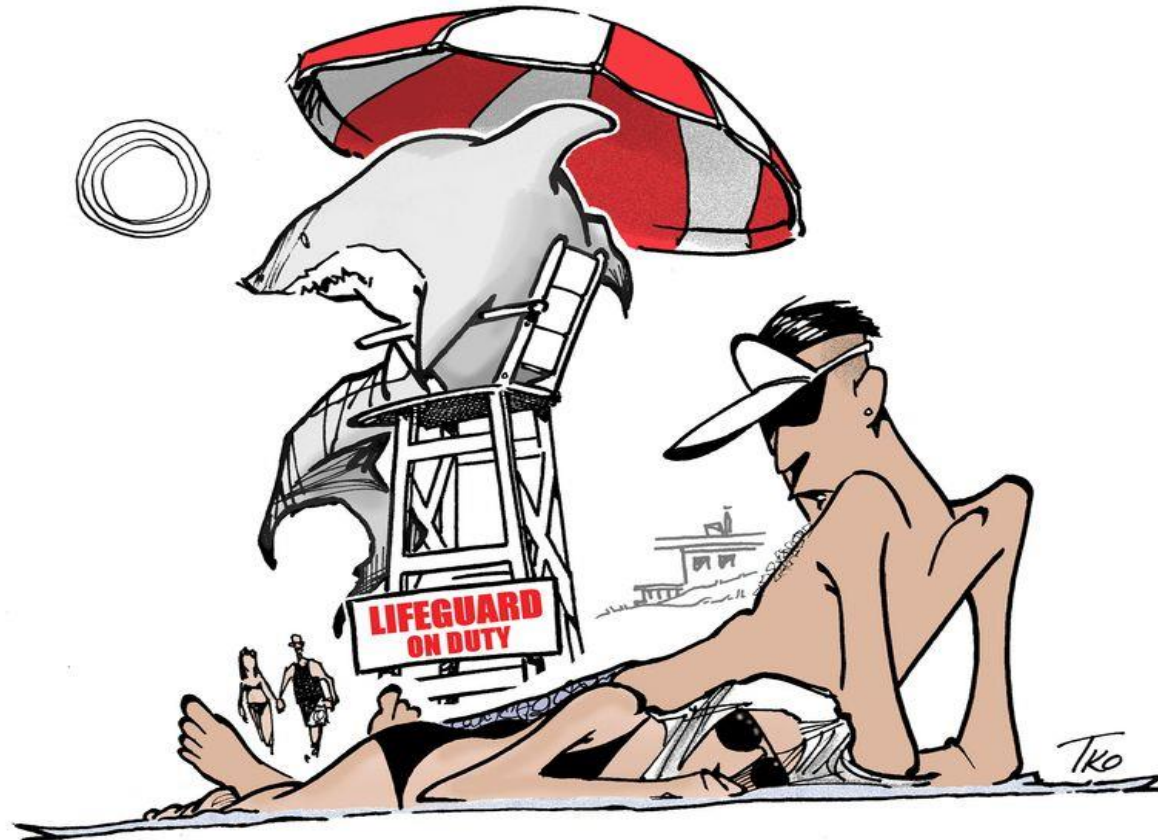
WHAT ETHICAL ISSUE DO YOU THINK THAT ATTORNEYS MOST OFTEN CALL THE BOARD FOR AN ETHICS OPINION?

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# CONFLICTS OF INTEREST

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*“So, I’m the only one who sees a  
conflict of interest here?”*



LAST YEAR THERE WERE 716 CONFLICTS OF INTEREST QUESTIONS ANSWERED.

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ONE OF THE MOST COMMON ETHICAL ISSUES THAT MAY ARISE IN THE PRACTICE OF ENVIRONMENTAL LAW IS THE PROBLEM OF CONFLICTS OF INTEREST.





# I. CONFLICTS ARISING IN CONNECTION WITH THE REPRESENTATION OF MULTIPLE PARTIES IN THE SAME MATTER

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# HYPOTHETICAL

YOU HAVE BEEN ASKED TO REPRESENT COMPANY A IN A MULTI-PARTY SUPERFUND MATTER WHERE COMPANY A'S INTEREST MAY BE ADVERSE TO COMPANY B. A CONFLICTS CHECK REVEALS THAT YOUR FIRM HAS NEVER REPRESENTED COMPANY B, BUT REPRESENTED COMPANY C, WHICH IS THE PARENT OF COMPANY B, IN A MERGER TRANSACTION. THE LANGUAGE OF COMPANY C'S RETAINER AGREEMENT IN THE MERGER TRANSACTION STATES THAT YOUR FIRM WAS HIRED TO REPRESENT COMPANY C AND ALL ASSOCIATED COMPANIES.

# ETHICAL ISSUES:

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IS THERE AN EXISTING CONFLICT? DO YOU NEED TO OBTAIN INFORMED CONSENT?

IF BOTH PARTIES, COMPANY A AND COMPANY B, REQUEST YOUR REPRESENTATION IN THE SUPERFUND MATTER, MAY YOU TAKE THE CONCURRENT REPRESENTATION ?

# ANALYSIS:

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ALTHOUGH YOUR FIRM DOES NOT DIRECTLY REPRESENT COMPANY B, THE LANGUAGE IN THE RETAINER AGREEMENT GIVES COMPANY C THE REASONABLE EXPECTATION THAT YOUR FIRM ALSO REPRESENTS ANY OF ITS SUBSIDIARIES. THEREFORE, YOU SHOULD OBTAIN COMPANY C'S CONSENT BEFORE UNDERTAKING THE REPRESENTATION OF COMPANY A.

# RULE 1.7 APPLIES HERE.

“ A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION INVOLVES A CONCURRENT CONFLICT OF INTEREST.”

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“A CONCURRENT CONFLICT OF INTEREST EXISTS IF THERE IS A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE OR MORE CLIENTS WILL BE MATERIALLY LIMITED BY THE LAWYER’S RESPONSIBILITIES TO ANOTHER CLIENT, A FORMER CLIENT, OR A THIRD PERSON OR BY A PERSONAL INTEREST OF THE LAWYER.”

*TENNESSEE RULES OF PROFESSIONAL CONDUCT 1.7(a)(2).*



# RPC 1.7(b) ALLOWS FOR WAIVER OF CONCURRENT CONFLICTS OF INTEREST.

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1. THE LAWYER MUST BELIEVE THAT THE LAWYER WILL BE ABLE TO PROVIDE COMPETENT REPRESENTATION TO EACH AFFECTED CLIENT;
2. THE REPRESENTATION IS NOT PROHIBITED BY LAW;
3. THE REPRESENTATION DOES NOT INVOLVE THE ASSERTION OF A CLAIM BY ONE CLIENT AGAINST ANOTHER CLIENT REPRESENTED BY THE LAWYER IN THE SAME LITIGATION OR OTHER PROCEEDING BEFORE A TRIBUNAL; AND
4. EACH AFFECTED CLIENT GIVE INFORMED CONSENT, CONFIRMED IN WRITING.

MULTIPLE REPRESENTATIONS IN  
SUPERFUND MATTERS ARE GENERALLY  
PERMISSIBLE

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THE **GENERAL OPINION** AMONG COMMENTATORS IS THAT MULTIPLE REPRESENTATIONS ARE PERMITTED, AS LONG AS THE LAWYER EXAMINES EACH SITUATION FOR COMPLIANCE WITH RPC 1.7.

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A GROUP OF SIMILAR CLIENTS MAY HAVE SUFFICIENT COMMON INTEREST IN COOPERATING WITH REGULATORY AGENCIES TO PERMIT MULTIPLE REPRESENTATION.

**HOWEVER**, IF TWO PARTIES CANNOT AGREE ON HOW LIABILITY SHOULD BE APPORTIONED BETWEEN THEM, IT WOULD NOT BE PERMISSIBLE TO HAVE MULTIPLE REPRESENTATION BECAUSE THEIR POSITIONS ARE FUNDAMENTALLY ANTAGONISTIC.

# FACTORS RELEVANT IN DETERMINING WHETHER THE CLIENTS NEED TO BE ADVISED OF THE RISK INCLUDE:

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WHERE THE CASES ARE PENDING;

WHETHER THE ISSUE IS SUBSTANTIVE OR PROCEDURAL;

THE TEMPORAL RELATIONSHIP BETWEEN THE MATTERS;

THE SIGNIFICANCE OF THE ISSUE TO THE IMMEDIATE AND  
LONG TERM INTERESTS OF THE CLIENTS INVOLVED; AND

THE CLIENTS' REASONABLE EXPECTATIONS IN RETAINING  
THE LAWYER.

# CONFLICTS BETWEEN CURRENT CLIENTS IN DIFFERENT MATTERS

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# HYPOTHETICAL: (POSITIONAL CONFLICTS)

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THE POSITION ON SUBSTANTIVE LEGAL ISSUES YOU WILL BE ARGUING IN COMPANY A'S DEFENSE IS DIRECTLY CONTRARY TO THE POSITION YOU ARE ADVOCATING ON BEHALF OF ANOTHER CLIENT IN A DIFFERENT AND UNRELATED PENDING MATTER.

**IS ARGUING TWO SIDES OF THE SAME LEGAL ISSUE A CONFLICT OF INTEREST?**

# ANALYSIS:

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COMMENT [24] TO RPC 1.7 SAYS THAT ORDINARILY A LAWYER MAY TAKE INCONSISTENT LEGAL POSITIONS IN DIFFERENT TRIBUNALS AT DIFFERENT TIMES ON BEHALF OF DIFFERENT CLIENTS. THE MERE FACT THAT ADVOCATING A LEGAL POSITION ON BEHALF OF ONE CLIENT MIGHT CREATE PRECEDENT ADVERSE TO THE INTERESTS OF A CLIENT REPRESENTED BY THE LAWYER IN AN UNRELATED MATTER DOES NOT CREATE A CONFLICT OF INTEREST.



# HOWEVER, A CONFLICT OF INTEREST EXISTS IF:

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THERE IS A SIGNIFICANT RISK THAT A LAWYER'S ACTION ON BEHALF OF ONE CLIENT WILL MATERIALLY LIMIT THE LAWYER'S EFFECTIVENESS IN REPRESENTING ANOTHER CLIENT IN A DIFFERENT CASE, FOR EXAMPLE, WHEN A DECISION FAVORING ONE CLIENT WILL CREATE A PRECEDENT LIKELY TO SERIOUSLY WEAKEN THE POSITION TAKEN ON BEHALF OF THE OTHER CLIENT.

IF THERE IS A SIGNIFICANT RISK OF  
MATERIAL LIMITATION, THEN,

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THE LAWYER MUST REFUSE ONE OF THE REPRESENTATIONS  
OR WITHDRAW FROM ONE OR BOTH MATTERS.

# CONFLICTS WITH FORMER CLIENTS

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THE DUTIES OWED TO A FORMER CLIENT ARE SOMEWHAT LIMITED BUT REMAIN IN PERPETUITY.

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RPC 1.9 PROHIBITS A LAWYER FROM REPRESENTING A CLIENT (IN THE ABSENCE OF CONSENT) WHOSE INTERESTS ARE MATERIALLY ADVERSE TO THOSE OF A FORMER CLIENT WHOM THE LAWYER REPRESENTED IN **“THE SAME OR SUBSTANTIALLY RELATED MATTER.”**

## RPC 1.9 COMMENT [3b]: EXAMPLE:

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A LAWYER WHO HAS PREVIOUSLY REPRESENTED A CLIENT IN SECURING ENVIRONMENTAL PERMITS TO BUILD A SHOPPING CENTER WOULD BE PRECLUDED FROM REPRESENTING NEIGHBORS SEEKING TO OPPOSE REZONING OF THE PROPERTY ON THE BASIS OF ENVIRONMENTAL CONSIDERATIONS; **HOWEVER**, THE LAWYER WOULD NOT BE PRECLUDED, ON THE GROUNDS OF SUBSTANTIAL RELATIONSHIP, FROM DEFENDING A TENANT OF THE COMPLETED SHOPPING CENTER IN RESISTING EVICTION FOR NONPAYMENT OF RENT.

# QUERY:

**A woman has asked Attorney to represent her in obtaining compensation for a tract of land that is being condemned by the State Department of Transportation to build a new highway.**

**Two years ago, Attorney had been employed by the Department and had been assigned to search title on several tracts of land, including the one owned by the woman.**

**Attorney remembers a Department engineer had drafted a confidential memorandum advising against running a new highway across the woman's land because of a potential adverse environmental impact.**

**Because of this information, Attorney believes it is possible to prevent the condemnation of the woman's land or to increase the settlement amount.**

# CAN ATTORNEY TAKE THIS CASE?

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## RULE 1.11(c)

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If you obtained confidential government information about a person when you worked for the agency, you cannot represent a private client whose interests are adverse to the person when the information could be used to material disadvantage to that person.

“Confidential information” means info that the agency is prohibited from revealing and which is otherwise not available to the public.

# CAN ANOTHER ATTORNEY IN THE DISQUALIFIED ATTORNEY'S OFFICE TAKE THE CASE ?

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# RULE 1.11

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IF YOU ARE DISQUALIFIED BECAUSE OF YOUR PRIOR REPRESENTATION OF THE AGENCY, SO IS YOUR LAW FIRM **UNLESS** YOU IMPLEMENT SCREENING PROCEDURES OUTLINED IN THE RULE.

# RPC 1.11(b) SETS OUT SCREENING PROCEDURES

1. ASCERTAIN THAT THE PERSONALLY DISQUALIFIED LAWYER IS PROHIBITED FROM PARTICIPATING IN THE REPRESENTATION OF THE CURRENT CLIENT; AND
2. DETERMINE THAT NO LAWYER REPRESENTING THE CLIENT HAS ACQUIRED ANY MATERIAL CONFIDENTIAL GOVERNMENT INFORMATION RELATING TO THE MATTER; AND
3. PROMPTLY IMPLEMENT SCREENING PROCEDURES TO EFFECTIVELY PREVENT THE FLOW OF INFORMATION ABOUT THE MATTER BETWEEN THE PERSONALLY DISQUALIFIED LAWYER AND OTHER LAWYERS IN THE FIRM; AND
4. ADVISE THE GOVERNMENT AGENCY IN WRITING OF THE CIRCUMSTANCES THAT WARRANTED THE UTILIZATION OF THE SCREENING PROCEDURES AND ACTIONS TO COMPLY.

# SOCIAL MEDIA

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# SOCIAL NETWORKING AND BLOGGING

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ENVIRONMENTAL LAWYERS, LIKE OTHER LAWYERS, HAVE BECOME INCREASINGLY RELIANT ON THE INTERNET FOR MANY ASPECTS OF THEIR PRACTICE.

ENVIRONMENTAL LAWYERS RELY ON THE INTERNET NOT ONLY FOR RESEARCH, BUT ALSO TO MAINTAIN OFFICE RELATED WEBSITES, TO COMMUNICATE WITH CLIENTS, AND PROSPECTIVE CLIENTS AND FOR MARKETING PURPOSES.



# HYPOTHETICAL:

DURING DISCOVERY, YOU DEPOSE W, AN ADVERSE WITNESS, AND DURING THE COURSE OF THE DEPOSITION, W REVEALS THAT SHE HAS ACCOUNTS ON FACEBOOK AND LINKEDIN, TWO SOCIAL NETWORKING SITES THAT PERMIT “FRIENDS” OF USERS TO ACCESS PERSONAL INFORMATION POSTED BY THAT USER. YOU ALSO LEARN THAT W WOULD “FRIEND” ANYONE WHO REQUESTS TO BE HER FRIEND. YOU BELIEVE THAT W HAS POSTED INFORMATION ON HER PAGES THAT MAY BE USED TO IMPEACH HER AT TRIAL. YOU ASK YOUR PARALEGAL, P, WHO IS NOT FRIENDS WITH W TO TRY TO “FRIEND” W. P WILL USE HER REAL NAME, BUT WILL NOT REVEAL WHERE SHE WORKS OR THE REASON SHE WANTS TO BE W’S “FRIEND.”

# ETHICAL ISSUES:

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IS THE LAWYER RESPONSIBLE FOR THE PARALEGAL'S CONDUCT ?

HAS THE LAWYER ENGAGED IN PROFESSIONAL MISCONDUCT ?

DID THE LAWYER MAKE A FALSE STATEMENT OF MATERIAL FACT TO A WITNESS ?

# RPC 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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“WITH RESPECT TO A NONLAWYER EMPLOYED OR RETAINED BY OR ASSOCIATED WITH A LAWYER:

(C) A LAWYER SHALL BE RESPONSIBLE FOR CONDUCT OF A NONLAWYER THAT WOULD BE A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF ENGAGED IN BY A LAWYER IF:

1. THE LAWYER ORDERS OR, WITH KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED; OR
2. ...KNOWS OF THE NONLAWYER’S CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

# ANALYSIS:

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BECAUSE YOU ARE P'S EMPLOYER AND IN A POSITION OF AUTHORITY, P MAY BELIEVE THAT SHE IS OBLIGATED TO "FRIEND" W. FURTHER, YOU ARE PROCURING THE CONDUCT, AND IF P BECOMES W'S "FRIEND", YOU WOULD BE RATIFYING IT WITH FULL KNOWLEDGE OF THE IMPROPRIETY. THEREFORE, EVEN THOUGH YOU DID NOT ENGAGE IN THE ACTUAL CONDUCT, YOU ARE RESPONSIBLE FOR P'S ACTIONS, AND ARE THUS RESPONSIBLE FOR VIOLATING RPC 5.3.

# RPC 8.4 MISCONDUCT

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IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

(a) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST OR INDUCE ANOTHER TO DO SO, OR DO SO THROUGH THE ACTS OF ANOTHER;...

(C) ENGAGE IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION...

AS ETHICS COUNSEL, MY JOB IS TO ANSWER THE ETHICS HOTLINE AND GIVE GUIDANCE TO ATTORNEYS WHO ARE FACING AN ETHICAL DILEMMA.

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# WHEN IN DOUBT ABOUT AN ETHICAL DILEMMA CALL THE ETHICS HOTLINE

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You can get advice when you don't know what to do with regard to the ethics of a situation in your practice.





615-361-7500 locally

1-800-486-5714 from anywhere in U.S.A.

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# HOW TO GET ASSISTANCE WITH AN ETHICAL DILEMMA?

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1. PICK UP THE PHONE AND CALL 615-361-7500 EXTENSION 212; OR
2. USE THE BOARD'S ONLINE INFORMAL ETHICS INQUIRY PROGRAM; OR
3. SEND AN EMAIL WITH THE FACTS AND YOUR QUESTION(S) TO [lhastain@tbpr.org](mailto:lhastain@tbpr.org)

# WHEN GIVING ETHICS OPINIONS, ETHICS COUNSEL IS PROHIBITED FROM GIVING ETHICS OPINIONS BY BOARD POLICY IN THE FOLLOWING SITUATIONS:

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1. MATTERS PENDING BEFORE A COURT OR ADMINISTRATIVE BODY;
2. ANOTHER LAWYER'S CONDUCT;
3. YOUR OWN PAST CONDUCT.



# WHEN CAN ETHICS COUNSEL GIVE AN INFORMAL ETHICS OPINION?

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WHEN YOU ARE SEEKING GUIDANCE REGARDING YOUR OWN PROSPECTIVE CONDUCT.

WHEN YOU ARE SEEKING WHAT YOU SHOULD DO UNDER THE CIRCUMSTANCES CONSIDERING THE RULES OF PROFESSIONAL CONDUCT.

WHEN YOU ARE SEEKING THE RULES OF PROFESSIONAL CONDUCT THAT APPLY TO YOUR SITUATION.



# IS MY ETHICS INQUIRY CONFIDENTIAL?

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YES, EVERY ETHICS CALL IS CONFIDENTIAL. THERE IS A CONFIDENTIAL RECORD MADE OF EACH CALL THAT IS NOT SUBJECT TO A PUBLIC RECORDS REQUEST.

THE LAWYER MAKING THE CALL HAS THE RIGHT TO WAIVE THE CONFIDENTIALITY IN THE EVENT THAT THE LAWYER WANTS TO USE THE FACT THAT HE/SHE CALLED THE BPR FOR GUIDANCE.



# TENNESSEE SUPREME COURT RULE 9

## SECTION 5.4(C)

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An advisory ethics opinion may be issued by disciplinary counsel when there is readily available precedent. The advisory opinion shall not be binding on the board and shall offer no security to the person requesting it. All requests for advisory opinions, oral and written, and any response by disciplinary counsel shall be confidential and **shall not be public records or open for public inspection** except as subject to waiver by the requesting attorney or as otherwise provided in section 32.

# FORMAL ETHICS OPINIONS

SUPREME COURT RULE 9, SECTION 5 GOVERNS THE ISSUANCE OF FORMAL ETHICS OPINIONS BY THE BOARD OF PROFESSIONAL RESPONSIBILITY.

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THESE OPINIONS TAKE AT LEAST 3 MONTHS TO OBTAIN DUE TO THE FACT THAT THE BOARD MEETS QUARTERLY.

THESE OPINIONS MUST BE REQUESTED IN WRITING AND COMPLY WITH SUPREME COURT RULE 9, SECTION 5.4(b).

GENERALLY, THE BOARD WILL ISSUE OPINIONS ON SUBJECTS THAT WILL HAVE MEANING AND GIVE GUIDANCE TO A BROAD SPECTRUM OF LAWYERS RATHER THAN A SPECIFIC NARROW QUESTION AFFECTING VERY FEW LAWYERS.



# THE LATEST RULING BY THE TENNESSEE SUPREME COURT ON THE TBA'S AND BPR'S PETITION TO AMEND RULE 8.4 TO ADD A VERSION OF THE MODEL RULES ON DISCRIMINATION

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# CONTACT INFORMATION

Ethics Counsel – Laura Chastain (615) 361-7500 ext. 212

Consumer Assistance Program (615) 361-7500

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Tennessee Lawyers Assistance Program (615) 741-3238

Tennessee Board of Law Examiners (615) 741-3234

Tennessee Commission on Continuing Legal Education (615) 741-3096

Tennessee Board of Judicial Conduct (615-649-8851)

Tennessee Attorney General's Office (615-741-3491)

*Unauthorized practice of law:* Nate Casey (615-741-2935)



*That's all Folks!*